



September 10, 2007

By Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Ex Parte Notice: WC Docket Nos. 06-125 and 06-147

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, the Ad Hoc Telecommunications Users Committee hereby gives notice that, on September 7, 2007, the following parties met with Chairman Martin; Daniel Gonzalez and Ian Dillner, Chief of Staff and Legal Advisor to Chairman Martin respectively; and Thomas Navin, Chief of the Wireline Competition Bureau, with regard to the proceedings referenced above: Colleen Boothby of Levine Blaszak Block and Boothby on behalf of the Ad Hoc Telecommunications Users Committee; John Heitmann of Kelley Drye Collier Shannon on behalf of XO Communications and NuVox Communications; Lisa Youngers of XO Communications; Russell Blau of Bingham McCutchen on behalf of Alpheus Communications, Cavalier Telephone, Deltacom, Inc., Integra Telecom, McLeodUSA Telecommunications, Mpower Communications, TDS Metrocom, and U.S. TelePacific Corp., d/b/a TelePacific Communications; Russ Merbeth of Integra Telecom¹; Sheba Chacko of BT Americas; and Jerry James, Jonathan Lee and Karen Reidy of COMPTel.

In the meeting, the parties stressed their collective view that the petitions at issue in the dockets captioned above should be denied for vagueness, lack of sufficient evidentiary support, and other infirmities. The parties emphasized that the Commission should not grant any relief with respect to access services, including the subset of special access services sometimes referred to as enterprise broadband services. The parties emphasized that:

- The term "access service" describes the use of incumbent local exchange carriers' exchange plant necessary to originate and terminate interexchange services. *See MTS and WATS Market-Structure*, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC 2d 241 (1983) at para. 14. The Commission's access orders and access rules created a system of access charges by which local telephone companies receive compensation for the use of their plant to

¹ Participating only with respect to WC Docket No. 06-125.



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complete interstate telecommunications offerings. In its orders adopting the access rules, “[t]he FCC distinguished two broad categories of services provided by the BOCs to interexchange carriers. ‘Switched’ access involves the shared use of local exchange facilities to originate and complete long-distance calls. ‘Special’ access involves the exclusive use of certain BOC facilities, generally private communications lines linking the end user’s premises to a BOC wire center and linking the wire center to the premises of an interexchange carrier.” *MCI v. FCC*, 842 F. 2d 1296, 1298 (D.C. Cir. 1988) (“*Access Charge Order*”).

- The special access category includes a broad range of telecommunications services and technologies. “Although special access circuits may be used to transmit ordinary voice communications, they are also used extensively to transmit telex, telegraph, video and other types of signals between end users and interexchange carriers....” *Id.* The “wide range of special access services” includes “dedicated channels ranging from telegraph grade to television, and may be single or duplex, analog or digital, and in some cases full- or part-time. In addition, the special access category includes the rates for numerous optional features and functions to meet the widely varying and often specialized needs of special access users.” *Investigation of Special Access Tariffs of Local Exchange Carriers*, Phase II, Part 1, Memorandum Opinion and Order, 4 FCC Rcd 4797 (1988).

- The Commission has long recognized the significant role played by special access services in supporting newly-emerging, specialized data transmission needs and computer technologies like those deployed in and supported by today’s sophisticated data networks. “As telecommunications plays a larger and larger role in fundamental U.S. industries, the problems resulting from inappropriate pricing grow....Access pricing that does not reflect cost can turn computer technologies from directions that would enhance the productivity of this essential U.S. industry and all of the industries that depend on computers and communications toward simple avoidance of non-cost based telecommunications prices. Investment may be misdirected as a result.” *See Access Charge Order, supra*, at para. 29 (footnotes omitted).

- The petitions at issue failed to describe with specificity the services for which petitioners are seeking forbearance or to distinguish between the interstate access services the petitioners provide and the interstate interexchange services they provide using the same transmission technologies. The petitions include as attachments lists of services identified by either the brand name the petitioner uses in the marketplace or by the generic transmission technology used to deliver the service. But those attachments, and references to them in the text of



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the petitions, fail to indicate whether the petitioners seek forbearance only for the interstate interexchange services that use these technologies or as well for the access services they provide using the same technologies.

- For example, as local exchange carriers who provide access service pursuant to access tariffs on file with this Commission, petitioners provide Ethernet, which allows access customers to obtain an Ethernet-formatted connection between a customer's designated premise and the customer's point of presence in the same exchange area. Customers may then use the Ethernet access connection to originate and terminate interstate interexchange traffic between the customer's designated premise and points nation-wide. (The interexchange traffic may, but need not be, formatted as Ethernet traffic when the customer transmits it over the "long haul" facilities that connect the customer's points of presence in different exchanges.)
- But as companies that also provide interstate interexchange (*i.e.*, long distance) service, the petitioners also provide Ethernet service on an interstate interexchange basis to customers purchasing end-to-end long distance service. The petitioners currently provide their interstate interexchange services on a non-dominant, non-tariffed basis. The BOC petitioners provide interstate interexchange services through separate affiliates, though they may choose to eliminate their separate affiliates and provide those services on an integrated, non-dominant basis pursuant to this Commission's recent action in its *Section 272 Affiliate Sunset Order*.² These services are not provided pursuant to the petitioners' access tariffs.
- The petitioners proffered support for their forbearance requests with evidence regarding competitive conditions in the interstate interexchange market. The petitioners did not, however, provide evidence regarding competitive conditions in their in-region access markets.
- Accordingly, to the extent that the petitions may be seeking forbearance for access services that use the transmission technologies named in the attachments to their petitions, the petitions must be denied because the

² *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission Rules, Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services, Report and Order and Memorandum and Opinion, WC Docket Nos. 02-112 and 06-120, CC Docket No. 00-175, FCC 07-159 (rel. Aug. 31, 2007).*



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evidentiary record does not support forbearance for their in-region access services.

- To the extent that the petitions seek forbearance for interstate interexchange services that use the transmission technologies named in the attachments to the petitions, the petitions can be granted to the same extent that such relief was recently granted by, and for the reasons advanced in, the Commission's *Section 272 Affiliate Sunset Order*.

The Commission should therefore dismiss the petitions as moot with regard to the interstate interexchange services addressed by the *Section 272 Affiliate Sunset Order*, and deny the petition as to any other relief sought by the petitioners. The non-BOC petitioners should receive no other relief. Notably, such relief would not include any special access products used by competitors as wholesale transport or wholesale loop inputs to their own competitive broadband service offerings.

Sincerely,

Colleen Boothby

cc: Chairman Martin
Daniel Gonzalez
Ian Dillner
Thomas Navin
John Hunter
Scott Deutchman
Scott Bergman